Nos. 11722, 11723, 11724, 11725, 11726

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. J. GOERIG and CLYDE PHILP, *Appellants*,
v.
CONTINENTAL CASUALTY COMPANY, A Corporation, *Appellee*,

A. J. GOERIG and CLYDE PHILP, *Appellants*,
v.
CONTINENTAL CASUALTY COMPANY, A Corporation, and J. W. MORRISON, an individual, doing business as J. W. MORRISON COMPANY, *Appellees*.

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, *Judge*

SKEEL, MCKELVY, HENKE, EVENSON & UHLMANN
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WESTERN PRINTING CO. SEATTLE, WASHINGTON

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QUESTION INVOLVED IN THE CASE

Is appellee, Continental Casualty Company, who was adjudged liable on its payment bond to each of five Use Plaintiffs, entitled to judgment over on its cross complaint against appellants, Goerig and Philp, who were silent partners of the contractor, Macri & Co., where the Use Plaintiffs did not recover judgment directly against the appellants, Goerig and Philp? The Trial Court granted such recovery.

PRELIMINARY STATEMENT

The five cases here on appeal were by pretrial order of the district court consolidated for trial and heard at one time. (Tr. 11722-17; 11723-19; 11724-17; 11725-19; 11726-16). For all practical purposes and except as hereafter noted, all five cases here on appeal have the same factual basis and the same law is applicable in each case.

Appellee concurs in appellants' jurisdictional statement. The only material difference in the five cases is (1) in No. 11726 the Use Plaintiff recovered a judgment of $919.97 against Specification No. 1062; and (2) in case No. 11723 the Use Plaintiff recovered judgment against appellants, Goerig and Philp, as well as against Continental Casualty Company and the Macri partners. In all the other cases, the Use Plaintiffs were

allowed judgment only against the Macri partners and appellee bonding company. In all of the cases, the appellee, Continental Casualty Company, was granted judgment over on its cross complaint against the appellants, Goerig and Philp.

STATEMENT OF THE CASE

On December 7, 1943, Macri & Company entered into a contract with the United States of America referred to as Specification No. 1062 (Tr. 58). As a necessary condition precedent to the entering into of said contract, Macri & Company procured a payment bond from Continental Casualty Company, which was also dated December 7, 1943 (Tr. 60). It will be noted that the agent or attorney-in-fact for Continental Casualty Company in the writing of this bond was one of the appellants, Clyde E. Philp.

As a condition precedent to obtaining Continental Casualty Company's payment bond, Macri & Company, acting by and through Sam Macri, executed an application for such bond which contained an indemnity agreement, which, in part, reads as follows (Tr. 67);

> "Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof,

> in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom and in enforcing any of the agreements herein contained."

This application and indemnity agreement was likewise dated December 7, 1943.

On December 11, 1943, the appellants, Goerig and Philp, and the defendants, Sam Macri, Joe Macri and Don Macri, entered into a joint venture agreement in connection with the contract referred to as Specification No. 1062. The joint venture agreement among other things provided for the division of profits and the method of sharing losses. The joint venture agreement in connection with the execution of the contract Specification No. 1062 and the obtaining of the payment bond from Continental Casualty Company provided as follows (Tr. 93):

> "That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, *yet, regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties hereto that the same was executed for and on behalf of the parties hereto in proportion to their interest herein*, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company

or companies as might be engaged by the parties hereto in that regard.

"It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments, they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates."

The joint venture agreement likewise provided that bond and bond application including the indemnification agreement was the engagement and obligation of each of the parties to the joint venture agreement (Tr. 95):

"Each of the parties hereto acknowledge their interest in the perfomance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportion as hereinafter stated, *and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to*

execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters."

On May 18, 1944, Macri & Company, acting by and through Sam Macri, entered into a contract with the United States of America referred to as Specification No. 1068 (Tr. 62). Also on May 18, 1944, Macri & Company obtained payment bond from Continental Casualty Company covering the contract Specification No. 1068 and which was a necessary prerequisite to entering into such contract with the United States. Also as a necessary prerequisite to obtaining the bond, Macri & Company, acting by and through Joe Macri, signed the necessary application for bond, including indemnity agreement (Tr. 80).

In connection with contract Specification 1068, appellants, Goerig and Philp, and defendants, Sam Macri, Joe Macri and Don Macri, previously entered into a joint venture agreement, which was dated December 11, 1943 (Tr. 100). The bond, the bond application, including indemnity agreement, and the joint venture agreement were exactly the same as the documents previously executed in connction with contract Specification 1062 and contained the same provisions. It will be noted, however, that in connection with Specification 1068, the joint venture agreement was executed and signed December 11, 1943, and thus the contract

Specification 1068, the bond, and the bond application, including the indemnity agreement, were executed in compliance with and under the provisions of the said joint venture agreement.

In bringing their actions, each of the five Use Plaintiffs named as parties defendant, the appellants, Goerig and Philp, and designated them as partners or joint adventurers doing business under the name of Macri & Co. The trial court in its findings in each case (Tr. 11722-40, 11723-22, 11724-20, 11725-22, 11726-20) found that appellants, Goerig and Philp, had been previously associated with the Macris under a joint venture agreement. The trial court further found that the bond application, including the indemnity agreement, was executed and that the bond was issued for and on behalf of all of the co-partners and joint adventurers, including the appellants, Goerig and Philp (Tr. 11722-44, 11723-27, 11724-24, 11725-28, 11726-24).

In each of the five cases, the Use Plaintiffs recovered judgment against the Macri partners and against the Continental Casualty Company on its bond. In none of the five cases except No. 11723 were the Use Plaintiffs granted judgment against the appellants, Goerig and Philp; this, apparently, on the theory that none of the four Use Plaintiffs commenced to furnish labor or material until a date subsequent to the execution of

the so-called "termination agreement." In case No. 11723, the Use Plaintiff was granted judgment likewise against the appellants, Goerig and Philp, on the theory that in that one case, Use Plaintiff had furnished labor and material prior to the execution of the "so-called" termination agreement.

In each of the five cases, the appellee, Continental Casualty Company, was granted judgment over against each of the joint adventurers, including appellants, Goerig and Philp, in amounts equal to judgments which had been rendered against the bonding company in favor of the Use Plaintiffs.

ARGUMENT

The judgments obtained by the Use Plaintiffs against Continental Casualty Company aggregated approximately $33,500, which included interest, attorneys' fees and costs, and all of said judgments were procured under contract Specification No. 1068, except one small judgment in the amount of $919.97 was obtained under Specification No. 1062. A summary of the pertinent dates involved under Specification No. 1068 were:

1. December 11, 1943, date of joint venture agreement.
2. May 18, 1944, date of contract, Specification 1068 with the United States.

3. May 18, 1944, date of bond and bond application relating to Specification 1068.
4. July 15, 1944, date of so-called "Termination Agreement."

From an analysis of the foregoing dates, it is clear that contract Specification No. 1068 was entered into by Macri & Co. on behalf of the joint adventurers including the appellants, Goerig and Philp. It is likewise clear that the bond and bond application were entered into on behalf of and under the authority of the joint venture agreement by all of the joint venturers, including appellants, Goerig and Philp. Under these facts, the only questions for determination by this court are: (1) the nature, effect and legal status of a joint venture, and (2) the extent of the legal liability and obligations to be imposed upon a dormant or silent partner.

a. Joint Adventurers Are Liable as Partners

The subject of joint adventures is of comparatively modern origin, yet by the great weight of authority in the United States, the law applicable to a joint adventure is governed by the same rules of law applicable to partnerships.

A very thorough analysis of the legal relationship known as joint adventure was made by Professor Frank L. Meachem in 15 Minn. Law Review 44. The

following extracts from his article are quoted with approval by the court in *State ex rel Crane Company v. Stokke*, (S. D.) 272 N. W. 811:

> "On the whole the concept of joint adventure as a relationship or association different from partnership seems to have little, if any, reality. To a lawyer or a litigant it can make no difference in the present state of the law whether the court calls the association by one name or another. For all practical purposes no one cares very much whether the law treats joint adventures as a special type of partnership or a different kind of association. The consequences of being held to be one or the other are almost, if not quite, identical."
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> * * *
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> "When the law has progressed to this point—viz., applying the same test and reaching the same legal consequences for both partnership and joint adventure—the usefulness of regarding joint adventure as a distinct kind of relationship or association seems questionable."
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> * * *
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> ". . . at the present time, there is no law of joint adventure. There is a law of partnership and that is all. The law of partnership is applied point for point to all joint adventure controversy and identical results are reached under similar circumstances, no matter whether the association is regarded as a partnership or as a joint adventure. It logically follows from this that there is no reason for distinguishing partnership and joint adventure situations by making a separate classification for the latter, unless perhaps for the purposes of convenience in describing a kind of partnership, and even so it is arguable that the English practice of calling it a special partnership is more in har-

> mony with a desire for simplicity and uniformity in the classification of law and legal relations."

The South Dakota court stated its approval of Professor Meachem's view in the following words:

> "We are under no necessity in the instant case of determining whether or not the law of this state does or should recognize joint adventure as a legal relationship different and distinct from partnership . . . It is well established by the great majority of decided cases that there is the same element of mutual agency in joint adventures as in partnerships and that a member of a joint adventure can bind his associates whether disclosed or undisclosed (as can a partner) by such contracts as are reasonably necessary to carry on the venture."

The text writers are likewise in accord with the rule that joint adventures and partnerships are to be governed by one and the same law in that the same rules apply to each. In 48 Corpus Juris Secundum, Joint Adventure, Sec. 14a, the following statement is made:

> "Liability of one member of a joint enterprise or adventure for acts of another member . . . is governed largely by principles analogous to those applicable to partnership and agency."

To the same effect is the following extract from 48 A. L. R. 1060:

> "Generally speaking it may be said that practically the only distinction between a joint adventure and a partnership is that the former relates to a single transaction (though it may comprehend a business to be continued over several years)

> while the latter relates to a general business of a particular kind."

In *Finney v. Terrell* (Tex. Civ. App.) 276 S. W. 340 (1935) the Texas Court spoke as follows:

> "The subject of joint adventures is comparatively of modern origin. It was unknown at common law, being regarded as within the principle governing partnerships. And while some jurisdictions hold that the joint adventure is not identical with partnership, it is everywhere regarded as of a similar nature and governed by the same rules of law."

The State of Washington has adopted the foregoing rules as laid down by the text writers and by Professor Meachem. In the case of *Priestley v. Peterson*, 19 Wn.(2d) 820; 145 P.(2d) 253, the court said:

> "The term joint adventure is rather new to the law, but the principles which control agreements of joint adventurers have often been discussed in cases involving alleged partnerships."

To the same effect is the case of *O. K. Boiler & Welding Company v. Minnetonka Lumber Company*, 229 Pac. 1045, in which the court said:

> "After the parties have created and engaged in a joint enterprise, although it may relate to a single transaction, the law of partnership applies to the questions arising between and among the parties and in relation to third parties."

b. Partners Are Each Liable for Obligations Incurred Within the Scope of the Partnership Business

The appellants, Goerig and Philp, by signing the joint venture agreement with the Macri partners in connection with contract Specification 1068, specifically authorized the obtaining of necessary bond to perform the contract and specifically assume the obligation under such bond, the bond application and the indemnity agreement (Tr. 94, 95). Such specific assumption of liability would not, however, be necessary as it is clearly the established law that one party to a joint adventure or one partner can bind all partners to that joint adventure in contract. The only limitation is that such contracts must be contracts reasonably necessary to carry on the business in which the joint adventurers are engaged. Appellants, Goerig and Philp, cannot plead they were ignorant of the necessity to obtain such bond as a prerequisite to entering into the contract with the United States government, because the joint venture agreement specifically mentions the obtaining of bond for the carrying on of the work. Also the Miller Act (40 U. S. C. A. Sections 270a and 270b) under which the government contract was let, specifically calls for a performance and payment bond. Appellants, Goerig and Philp, cannot plead ignorance of the fact that a bond was actually obtained in view of the fact that the appellant, Clyde Philp was himself the agent

who obtained the bond (Tr. 62). The obtaining of a surety bond was necessary in the performance of the contract with the United States (40 U. S. C. A., Sec. 270a and Sec. 270b).

The authorities are uniform that the act of one partner will bind all partners insofar as such act is within the general scope of the partnership business. The State of Washington has adopted such uniform rule in the case of *Priestley v. Peterson*, 19 Wn.(2d) 820; 145 P.(2d) 253, wherein the Supreme Court of the State of Washington said:

> 'It is the general rule that where parties become joint adventurers the act of one will bind all insofar as such act is within the general scope of the enterprise."

The court then quoted with approval from 33 Corpus Juris, Page 871, § 99, as follows:

> "As to third persons who deal with a joint adventuer in good faith and without knowledge of any limitations upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are engaged, and they become liable upon such contracts notwithstanding they may have expressly agreed amongst themselves that they should not be liable. But he cannot bind his associates by contracts made outside of the scope of the business in which they are engaged, or by contracts made for his individual benefit."

To the same effect is the following extract in the

opinion of the court in *Kennedy v. Conrad*, 9 P.(2d) 1075:

> "The general rule is that as to third persons who deal with a joint adventurer in good faith and without knowledge of any limitation upon his authority, the law presumes him to have been given power to bind his associates by such contracts as are reasonably necessary to carry on the business in which the joint adventurers are are engaged, and they become liable on such contracts notwithstanding they may have expressly agreed amongst themselves that they should not be liable."

The same general rule applies in favor of a surety to impose liability upon all the partners who compose the partnership firm at the time the partnership assumed the liability of the issuance of the surety bond. This rule is set forth in 50 Amer. Juris., "Suretyship," Page 1066:

> "A surety for a partnership debt has a right of action, on discharging the obligation, against all who composed the firm at the time they assumed the liability. This rule has been applied in respect to sureties in an attachment bond, given as a substitute for partnership property attached or a partnership debt although judgment in the action was obtained against only one partner."

Insofar as all judgments obtained under Specification 1068 are concerned, appellee, Continental Casualty Company, under the application of this rule is entitled to judgment over against appellants, Goerig and Philp. In connection with Specification 1068, the joint venture

agreement specifically granted the Macris authority to procure bonds and sign indemnity agreements which were binding upon all the joint adventures, was executed December 7, 1943. While such joint venture agreement was in full force and effect, the Macri partnership exercising the authority therein granted, procured and executed the contract Specification 1068, the bond, bond application and indemnity agreement for the benefit of all joint adventurers. It cannot be contended that appellants, Goerig and Philp, received no benefits from the execution of the contract, bond and bond application. They are liable to appellee, Continental Casualty Company, in the same manner as a partner is liable for partnership debts and obligations.

c. A Silent or Dormant Partner Is Liable on Partnership Obligations to Third Parties

It may be conceded that appellants, Goerig and Philp, were not active in the actual prosecution of the work on either contract Specification 1068 or 1062 and were, therefore, silent or dormant partners with the Macris.

A silent or dormant partner or an undisclosed principal is liable to third parties on contracts which are reasonably necessary to carry on the partnership venture. Such is the law as expressed by the great weight of authority in the United States. The rule is well

stated in 47 Corpus Juris, Partnership, § 384, as follows:

> "The rule that an undisclosed principal is liable for contracts made or benefits secured for him by his agent applies to a case where there is an undisclosed or dormant partner. As regards innocent third parties, an undisclosed or dormant partner, as a general rule, is liable for, and bound by, what the acting partner says or does within the scope of the partnership business, and if the acting partner enters into a contract, secures a benefit, or otherwise incurs an obligation in behalf of the firm, within the ordinary scope of the firm's business, without the fact that he is acting for an existing partnership, or that there is a dormant partner being disclosed or known to the other party to the transaction, the ensuing liability on such obligation may, at the election of the other party, be enforced against the acting party individually, or it may be enforced against the firm or the undisclosed partner or partners, or against the dormant partner, as the case may be. Under such circumstances the undisclosed or dormant partner may be held liable after he is discovered, although the acting partner, at the time of entering into the transaction, represented that there was no partnership, and, although the third party, at the time of the transaction, supposed that he was dealing with, and giving credit to, the ostensible partner as an individual."

The same rule is expressed in 30 Amer. Juris., Joint Adventurers, § 41, as follows:

> ". . . as a general rule, each of several joint adventurers has power to bind the others and to subject them to liability to third persons in matters which are strictly within the scope of the joint

> enterprise. Thus a member of a joint adventure can bind his associates whether disclosed or undisclosed by such contracts as are reasonably necessary to carry on the venture."

The case of *O. K. Boiler & Welding Company v. Minnetonka Lumber Company,* 229 Pac. 1045, is a good illustration of the application of the rule. In that case it appeared that several parties entered into a joint adventure involving the construction of a building. The plaintiff lumber company subsequently delivered lumber to two of the joint venturers not knowing there were other parties to the joint adventure. Upon failure of the known joint adventurers to pay for the lumber delivered, the plaintiff lumber company filed a materialman's lien upon the premises jointly owned by the known and unknown joint adventurers. In affirming judgment in favor of the lumber company in its action to foreclose the lien, the court said at Page 1048:

> "The action of Baker (one of the joint adventurers) in entering into contract bound all of the members of the joint adventure, whether known or unknown to the lien claimant."

Upon application of the foregoing rule of law to the facts of the present case, there can be no question as to the liability of the appellants, Goerig and Philp, as members of the joint venture, to appellee, Continental Casualty Company, under the indemnity provisions of the application for bond. Appellants, Goerig and

Philp, were members of the joint adventure, entered into for the specific purpose of performing contract with the United States. The securing of the bond was a condition precedent to the entering into and carrying out of said contract Specifications 1068 and 1062. The obtaining of such payment bond was reasonably necessary and was within the scope of the partnership business. The execution of the indemnity agreement was a condition precedent to obtaining the bond. When the joint adventure failed to pay the laborers and material men, the bond became liable and all members of the joint adventure, including appellants, Goerig and Philp, became liable over to Continental Casualty Company, not only under the provisions of the indemnity agreement, but on the application of the law of principal and surety.

A case very closely in point with the instant case is *State ex rel Crane Company v. Stokke*, 272 N. W. 811. In that case, Stokke and one Evans enterd into a joint adventure to bid for the installation of an oil burner for the State of South Dakota. It was agreed between the joint adventurers that the bid would be made in the name of Stokke alone and that if they were successful, the contract would be taken only in Stokke's name. Their bid as made was successful and the contract was awarded to Stokke, but he was required to and did furnish a performance bond. The bond application

provided for the subrogation of the bonding company to all the rights of the principal. Upon default by Stokke in the payment of certain bills, the bonding company asserted its right to a state warrant payable to Stokke. This asserted right was contested by Evans, who claimed that, as a joint adventurer, he was entitled to one-half of that warrant and that Stokke was without authority to assign or dispose of Evans' interest in the state warrant. In holding that Evans was bound by the covenant made by Stokke for the purpose of obtaining the surety bond, the court said:

> "It is the rule established by the great majority of decided cases that there is the same element of mutual agency in joint adventures as in partnerships, and that a member of a joint adventure can bind his associates whether disclosed or undisclosed (as can a partner) by such contracts as are reasonably necessary to carry out the venture. . . . Evans knew or is chargeable as a matter of law with knowing that Stokke could not enter into this oil burner contract with the State of South Dakota without putting up a surety bond to guarantee his performance thereof. Evans must be bound by any reasonable agreement that Stokke made for the purpose of securing a bond which was a requisite to enjoying the joint venture contract. Evans cannot claim the benefit of that bond and repudiate the covenants entered into by Stokke for the purpose of obtaining it . . . As joint adventurer or partner, he must bear the burden of the contract which Stokke made and which was reasonable and necessary for the furtherance of the joint enterprise."

Appellants, Goerig and Philp, likewise cannot claim the benefit of the payment bond or repudiate the covenants of the indemnity agreement entered into by Joe Macri on behalf of the joint adventure for the purpose of obtaining it. When the bonding company, Continental Casualty Company, became liable to and did pay the laborers and materials, then each and all of the joint adventurers became liable to the bonding company under the provisions of the indemnity agreement, including appellants, Goerig and Philp.

d. Answer to Contentions of Appellants

Appellee's principal argument has been in connection with Specification 1068 in view of the fact that all of the judgments were rendered thereunder with the exception of the amount of $919.97, which was rendered in connection with Specification 1062, in case No. 11726. The only difference in connection with Specification 1062 is that the contract, the bond and the bond application were all signed December 7, 1943, while the joint adventure agreement in connection with Specification 1062 was four days later on December 11, 1943. That situation is not true with reference to Specification 1068 where the joint venture agreement was signed almost five months prior to the signing of the contract, bond and bond application.

Appellants, therefore, contend that on December 7,

1943, when the bond and bond application were signed, there was no authority for the Macris to bind appellants, Goerig and Philp, to the indemnity agreement in connection with procuring a bond for Specification 1062.

Such specific authority need not be given. The rules of law above set forth are applicable. If the parties to the joint venture agreement were partners for the purpose of carrying out a contract with the United States, then all of the partners, including Goerig and Philp, as silent or undisclosed partners are liable in connection with all obligations arising therefrom so long as the same were reasonably necessary in the performance of the venture entered into.

If there was no authority at the time of the signing of said bond and bond application under Specification 1062, then the signing of the bond application and indemnity agreement was specifically ratified by all the co-partners four days later, on December 11, 1943, when the joint venture agreement was executed. The joint venture agreement executed four days later specifically authorizes the signing of such bond application and indemnity provisions and it will be noted that such joint venture agreement states that each party thereto shall be liable upon such bond, bond application and indemnity agreement, whether or not the same was

signed and executed prior to or after the execution of the joint venture agreement.

The execution of the joint venture agreement constitutes a specific ratification of the acts of the Macri partners in signing the bond and bond application on behalf of the members of the joint adventure. 40 Amer. Juris., "Partnership," Paragraph 156, Page 240, states:

> "Ordinarily a partner has no implied authority to make contracts of guaranty or suretyship in the firm name. In order to make a contract of suretyship or guaranty executed by a partner binding on the other partners, or upon the partnership, authority for its execution must have been specially given or implied from the common course of the business of the firm, or from the previous course of dealings between the parties, *or have been afterward ratified by the co-partners.*"

On Specification 1068 there was specific authority given by joint venture agreement at time of signing. On Specification 1062 there was a specific ratification four days later by the signing of the joint venture agreement.

Appellants contend that the ordinary rule of partnership liability does not apply to indemnity agreements. Appellants contend that only the one partner executing the indemnity agreement is liable and that the other partners are not liable thereon. Appellants cite as authority for such rule the case of *Southern*

Surety Co. v. Plott (C. C. A. 4, 1928) 28 F.(2d) 698. The cited case was one of a contract required to be under seal by the laws of the state wherein the same was executed and in such case it was held that a person not signing the contract could not be bound. Such was merely the application of the simple rule of agency that the agent cannot bind the principal on a sealed instrument and that the parol evidence rule may not be violated to show such authority.

In the present case, there was no violation of the parol evidence rule to show the authority of the Macri partners to sign the bond application, since they had specific authority by virtue of the joint venture agreement wherein appellants, Goerig and Philp, specifically in writing authorized the execution of the bond application and indemnity agreement in Specification 1068 and specifically ratified the same in Specification 1062.

The evidence in the *Southern Surety Company* case, *supra*, discloses that the surety knew it was dealing with an agent and elected to write the bond on the credit of the agent alone without reference to the known principal. Again, such case has the application of the rule of agency that where third parties deal with an agent and know of the agency and elect to hold only the agent liable, then they cannot also hold the principal.

Such is not the case before the court where appellants, Goerig and Philp, were undisclosed or silent partners. Appellee, Continental Casualty Company, did not know of the existence of appellants, Goerig and Philp, at the time the bond and bond application were signed. Continental Casualty Company did not therefore elect to release or waive the right against known partners.

Likewise, the quotation on Page 16 of appellants' brief is not applicable as it specifically states therein that if a party is *informed* that the person with whom he is dealing is merely the agent for another and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal. Such a statement of law is not applicable to the present case where appellants, Goerig and Philp, were admittedly undisclosed, silent or dormant partners. Continental Casualty Company did not release or waive their rights against appellants, Goering or Philp, because they did not know of their existence until after the execution of the bond and indemnity agreement.

Appellants, Goerig and Philp, need not, individually, sign the bond application to be held liable thereon. Their grant of specific authority by execution of the joint venture agreement is sufficient to hold them liable to appellee, Continental Casualty Company. It is stated in 8 Amer. Juris., "Bonds," Sec. 10, Page 710:

> "It is not necessary for the obligor to sign the instrument personally, unless otherwise provided by statute. Ordinarily, the signature of his agent or proxy is sufficient. The question as to whether or not a bond has in law been duly executed by the principal obligor or obligors when his signature or some of their signatures are absent from the foot of the instrument or present without authority is largely a factual one, to be decided in the light of all the surrounding facts and circumstances."

Appellants, Goerig and Philp, contend that they are not liable to the bonding company in view of the fact that the so-called termination agreement was entered into prior to any of the Use Plaintiffs furnishing labor or material in the construction project. It is true that none of the Use Plaintiffs furnished any material or labor until after the execution of the so-called termination agreement, except the Use Plaintiff in Case No. 11723, which entered into a sub-contract on April 21, 1944, and delivered material between May 18, 1944, and October 15, 1945 (Tr. 11723-5 and 6).

The fact that no labor or material men furnished labor or material until after the execution of the so-called termination agreement in July, 1944, is immaterial insofar as the judgments of Continental Casualty Company against appellants, Goerig and Philp, are concerned.

Continental Casualty Company executed its bond in

connection with Specification 1062 on December 7, 1943, and in connection with Specification 1068 on May 18, 1944. Both bonds, immediately upon their execution, were delivered to the United States government as a condition prerequisite to the signing of the two contracts. Instantly upon execution of said bond and delivery to the United States, the appellee, Continental Casualty Company, became bound thereon and their liability was fixed. There was nothing that Continental Casualty Company could do to relieve themselves of the liability under such bond. The bonds were liable from that point forward to all laborers and materialmen who furnished or might furnish labor and materials to the project at any time in the future until the completion and termination of the contract. Insofar as Continental Casualty Company is concerned, it made no difference when the labor or material was furnished to the members of the joint adventure. Appellants, Goerig and Philp, gave no notice of their termination or attempted withdrawal from the joint venture relationship. The silent or dormant partners may not relieve themselves of liability by attempted withdrawal where no notice of such withdrawal is given. Likewise, a silent or dormant partner may not relieve himself of liability on obligations which have already become fixed, as has the bond in this case, by attempted withdrawal from the joint venture relationship.

The so-called termination agreement of July 15, 1944, should be examined by the court in connection with the attempted withdrawal from that relationship by appellants, Goerig and Philp. Under the wording of the joint venture agreement, appellants, Goerig and Philp, were entitled to share in the profits and were obligated to share likewise in the losses. The so-called termination agreement did not in reality or in fact or in law effect a termination of the joint venture agreement because by the wording of the termination agreement the appellants, Goerig and Philp, are entitled to any profits if profits are ultimately earned in connection with both Specification 1068 and Specification 1062 (Tr. 108). A portion of so-called termination agreement reads as follows (Tr. 110):

> ". . . it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4) and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.
>
> (1) It is understood that *in reference to the first four contracts or projects referred to* hereinbefore, the contract with the owners were entered into by first party and that second parties did not appear herein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties

have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result 52 1-3% thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. *In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.*"

Appellants, Goerig and Philp, cannot successfully maintain that as to third parties they have withdrawn from the joint venture relationship and yet amongst themselves continue to own and be entitled to a percentage of the profits, if any there are. It is submitted that the so-called termination agreement is not a true termination, but that the parties continued on with the same division of profits and losses as set forth in the joint venture agreement.

Appellants next contend that, since the Use Plaintiffs did not recover against appellants, there is likewise no right of action by Continental Casualty Company against the appellants. That is, that since no acts of

appellants, Goerig and Philp, resulted in their liability to the Use Plaintiffs, there can be no recovery by Continental against appellants.

The reasoning of appellants in this respect is unsound for the following reasons: (1) Continental was held liable on its bond because of the actions of the joint adventure, including appellants, Goerig and Philp. The liability upon Continental's bond became fixed from the instant that it was executed. The bond was put up at the request of and under the specific provisions of the joint venture agreement. (2) Although it may be that appellants, Goerig and Philp, could withdraw from the joint adventure relationship as to Use Plaintiffs, who had not as yet furnished labor or material, still they could not withdraw as to Continental, whose bond and liability thereunder had already become fixed. (3) The liability of appellants, Goerig and Philp, is based upon the bond application and indemnity agreement which they specifically authorized and agreed to be held liable on by the specific provisions of the joint venture agreement. It is, therefore, immaterial whether or not Goerig and Philp are also liable to the Use Plaintiffs. It is submitted, however, that appellants, Goerig and Philp, are liable and should have been held liable by the trial court to each of the Use Plaintiffs because the so-called termination agreement was not effective as

such and they remained liable as silent or dormant partners with the Macri brothers.

In support of their contention that a surety may not recover over against an indemnitor whose acts have been held not to have caused the liability for which recovery has been had against the surety, appellants, Goerig and Philp, cite the case of *Seattle v. Ericksen*, 99 Wash. 543; 169 Pac. 985. That case is not an authority for the proposition for which it is cited for two reasons: (1) the case has been specifically overruled by the Supreme Court of the State of Washington in the case of *Alaska Steamship Company v. Sperry*, 107 Wash. 545; 182 Pac. 634; and (2) the *Ericksen* case and the two *Northern Pacific Railway Company* cases, cited by appellants, are personal injury cases and are based upon the theory of res adjudicata. These cases hold that where the injured party sues two persons, both of whom might be liable, and the court dismisses the action as against one party and holds the other party liable, the party who has been held liable cannot then recover over against the party who has in the first case been dismissed. This was the holding in *Seattle v. Ericksen, supra*, but such ruling was based upon the theory of res adjudicata. This proposition, however, has since been specifically overruled in the *Alaska Steamship Company* case, *supra*, and is not now the law in the State of Washington.

Appellants' contention that they are not liable to Continental because Goerig and Philp were not liable to the Use Plaintiffs is indeed a novel and ingenious contention, but the same is not the law with respect to partnerships or suretyship.

The same answer is applicable to the case which appellants have cited, *Town of Flagstaff v. Walsh* (C. C. A. 9, 1925) 9 F.(2d) 590. The *Flagstaff* case is likewise one of personal injury and cites the case of *Seattle v. Ericksen, supra,* which has been specifically overruled. Such cases are in no way applicable to the present case.

It is next contended by appellants that where parties enter into a contract for the benefit of a third party (joint venture agreement and indemnity agreement), they may determine or rescind such contract prior to the time the first party has accepted the contract or changed his position in reliance thereon. Appellee believes that the law of contract for the benefit of a third party is not applicable to the present case and it appears to us that the sole issue before the court is that of the liability of a principal who has specifically authorized his agent to execute a contract with a third party. The present case involves the application of the liability of a silent or dormant partner who has specifically authorized by execution of a joint venture

agreement the active partners to execute the necessary bond application to carry on the partnership business. The execution of the joint venture agreement specifically authorizing the obtaining of the bonds and signing of the indemnity agreements is no more an application of the law of third party beneficiary contracts than is ordinarily found in every partnership transaction. The every-day performance of business requires the active partners to enter into contracts and perform acts for which the partnership, including dormant or silent partners, are liable to third parties. The joint venture agreement in this case is specific evidence of the liability of each of the partners, including Goerig and Philp, wherein they each agree that they shall be liable upon any bond executed and any indemnity agreements required under the execution of the bond.

The rule contended for by appellants is not applicable in view of the fact that Continental immediately upon execution of the bond and delivery thereof to the United States changed its position and its liability became fixed and it could not release itself from the obligation under its bond.

In connection with case No. 11723, the trial court found that the Use Plaintiff entered into a sub-contract with the joint adventure and, consequently, gave judgment in favor of Use Plaintiff against not only the

Macri partners and Continental, but also appellants, Goerig and Philp. Such judgment is sustained by the findings and by the law of the case.

CONCLUSION

We respectfully submit that the trial court was correct in its analysis of the facts and the application of the law thereto and that it correctly granted judgment over in favor of Continental Casualty Company against each of the joint adventurers, including appellants, Goerig and Philp. The judgment of the trial court should be affirmed.

Respectfully submitted,

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